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Gunasegaran a/l Singaravelu v Public Prosecutor

B HIGH COURT (JOHOR BAHRU) — CRIMINAL APPEAL NO MT(3)41–13 OF 2007
MOHD ZAWAWI JC
9 JANUARY 2009

C *Criminal Procedure — Trial — Close of prosecution's case — Evaluation of prosecution's evidence — Contradictions and discrepancies — Whether good ground for appellate intervention — Whether inconsistencies of evidence in criminal case should be resolved in favour of accused — Whether magistrate analysed or maximally evaluated evidence tendered — Whether accused entitled*
D *to acquittal and discharge at close of prosecution's case — Whether prima facie case made out — Criminal Procedure Code s 180*

Evidence — Burden of proof — Fatal accident — Evaluation of — Whether
E *prosecution established prima facie case — Whether learned magistrate erred in law in failing to judicially appreciate defence case — Whether quality of prosecution's evidence warranted appellant's acquittal*

F *Road Traffic — Reckless driving — Charge for driving recklessly or in manner dangerous to public — Causing death by dangerous or reckless driving — Accident viewed objectively — Whether evidence showed appellant drove recklessly — Whether essential ingredients of recklessness proved — Road Transport Act 1987 s 41(1)*

G

The appellant herein was appealing against the decision of the magistrate's court at Johor Bahru which had convicted him for causing death by dangerous or reckless driving, an offence under s 41(1) of the Road Transport
H Act 1987. The appellant was sentenced to one (1) month imprisonment and a fine of RM5,000, in default six (6) months imprisonment. In this case, a collision had occurred between a motorcar driven by the appellant and a motorcycle ridden by the deceased, Husamudin bin Badrudin, at the junction of Jalan Kolam Air — Jalan Kemuncak 2 in Johor Bahru, resulting in the
I death of the motorcyclist. The prosecution case was that the appellant drove his car from Jalan Kemuncak 2 into Jalan Kolam Air without stopping at the junction and that this amounted to reckless or dangerous driving. The appellant's defence was that he had completed turning right and was already on his own side of the road when the deceased's motorcycle encroached onto

his side and collided with his motorcar. The learned magistrate however, found the appellant guilty and accordingly convicted him. Against the said decision, the appellant appealed to this court contending, inter alia, that the learned magistrate who had based his decision entirely upon the evidence of SP5 and SP6, did not furnish any reason(s) as to why he preferred their version of the accident as opposed to the appellant's version of the accident. The appellant also contended that the learned magistrate had failed to scrutinise and evaluate the whole of the evidence adduced by the prosecution and further had erred in law when he did not judicially appreciate the defence case.

Held, allowing the appellant's appeal:

(1) There was no attempt made by the learned magistrate to analyse or maximally evaluate the evidence of the prosecution witnesses. Although it was not expressly stated in s 173(f) and (g) of the Criminal Procedure Code that reasons need to be accorded by court when considering whether or not a prima facie case has been made out, it was however clear from the said provision that the court was bound to give consideration to evidence adduced and then to arrive at a decision as to whether the accused may be acquitted or called upon to enter his defence on the charge against him. Such a decision should be reached only after a thorough and comprehensive evaluation of the evidence has been undertaken (see para 12).

(2) SP5's allegation that the appellant did not stop at the junction before turning right was questionable, given his failure to state this material fact in his police report. SP5's allegation that the appellant had smelled of beer after the accident was also demolished by the police investigating officer (SP8) and the two civilian witnesses (SP6 and SP7). The failure of the learned magistrate to consider these matters had greatly prejudiced the defence and was a strong ground for appellate interference. Further on the facts, the learned magistrate was clearly mistaken in rejecting the appellant's version of evidence for failure to call supporting evidence as the appellant's version of the accident was amply corroborated by prosecution witnesses and the police sketch plan and key (see paras 18–22).

(3) The charge was not one of causing death, but of driving dangerously or recklessly. In dealing with such a case, the whole situation leading to the accident must be viewed objectively to determine whether it could be considered reckless or dangerous driving. The learned magistrate had obviously failed to direct his mind to the law in this case and had been

unduly influenced by the fact that there had been a death. This was a non-direction which amounted to a misdirection (see paras 23, 24 & 26).

(4) In the instant case, the prosecution had failed to make out a prima facie case against the appellant and the latter ought to have been acquitted and discharged at the close of the prosecution's case. The failure of the learned magistrate to so hold was a serious misdirection in law resulting in a miscarriage of justice (see para 13).

[Bahasa Malaysia summary

Perayu di sini merayu terhadap keputusan mahkamah majistret di Johor Bahru yang mensabitkannya kerana menyebabkan kematian dengan memandu secara berbahaya atau melulu, satu kesalahan di bawah s 41(1) Akta Pengangkutan Jalan 1987. Perayu dihukum satu bulan penjara dan denda RM5,000, jika gagal enam bulan penjara. Dalam kes ini, perlanggaran berlaku di antara kereta yang dipandu oleh perayu dan motosikal yang ditunggang oleh si mati, Husamudin bin Badrudin, di simpang Jalan Kolam Air — Jalan Kemuncak 2 di Johor Bahru, yang menyebabkan kematian penunggang motorsikal. Kes pendakwaan adalah bahawa perayu memandu keretanya dari Jalan Kemuncak 2 menuju Jalan Kolam Air tanpa berhenti di simpang dan bahawa ini merupakan pemanduan melulu atau berbahaya. Pembelaan perayu adalah dia telah melengkapkan belokan ke kanan dan telah berada di bahagian jalannya apabila motorsikal si mati memasuki bahagian jalan dan berlanggar dengan keretanya. Walau bagaimanapun, majistret yang bijaksana, mendapati perayu bersalah dan mensabitkannya dengan sewajarnya. Terhadap keputusan tersebut, perayu merayu ke mahkamah ini dengan menegaskan, antara lain, bahawa majistret yang bijaksana yang telah mendasarkan keputusannya secara keseluruhan terhadap keterangan SP5 dan SP6, tidak menyediakan apa-apa alasan berkenaan dengan kenapa beliau lebih suka versi mereka berkenaan dengan kemalangan berbanding dengan versi perayu berkenaan dengan kemalangan. Perayu juga menegaskan bahawa majistret yang bijaksana telah gagal untuk meneliti dan menilai keseluruhan keterangan yang dikemukakan oleh pihak pendakwaan dan seterusnya salah dalam undang-undang apabila beliau tidak secara kehakiman menghargai kes pembelaan.

Diputuskan, membenarkan rayuan perayu:

(1) Tidak terdapat percubaan yang dibuat oleh majistret yang bijaksana untuk menyelidik atau meneliti secara maksimum keterangan saksi-saksi pendakwaan. Walaupun, ianya tidak secara jelas dinyatakan di dalam s 173(f) dan (g) Kanun Prosedur Jenayah bahawa alasan tidak

perlu diberikan oleh mahkamah apabila mempertimbangkan sama ada kes prima facie telah dibuktikan, bagaimanapun, ianya adalah jelas daripada peruntukan tersebut bahawa mahkamah adalah terikat untuk memberikan pertimbangan kepada keterangan yang dikemukakan dan kemudiannya membuat keputusan sama ada tertuduh boleh dilepaskan atau memanggilnya untuk memasukkan pembelaannya terhadap pertuduhan terhadapnya. Keputusan tersebut seharusnya dicapai hanya selepas membuat penilaian keterangan dengan teliti dan komprehensif (lihat perenggan 12).

(2) Dakwaan SP5 bahawa perayu tidak berhenti di simpang sebelum membelok ke kanan adalah dipersoalkan, terdapat kegagalannya untuk menyatakan fakta material ini di dalam laporan polisnya. Dakwaan SP5 bahawa perayu telah menghidu bau bir selepas kemalangan juga dimusnahkan oleh pegawai siasatan polis (SP8) dan dua saksi awam (SP6 dan SP7). Kegagalan majistret yang bijaksana untuk mempertimbangkan perkara ini telah memprejudiskan pembelaan dan adalah alasan yang kuat untuk campur tangan mahkamah rayuan. Selanjutnya di atas fakta, majistret yang bijaksana adalah jelas tersilap dalam menolak versi keterangan perayu atas kegagalannya memanggil saksi yang menyokongnya, kerana versi perayu berkenaan dengan kemalangan adalah disokong secukupnya oleh saksi pihak pendakwaan dan plan lakaran serta kekunci polis (lihat perenggan 18–22).

(3) Pertuduhan bukannya terhadap sesuatu yang menyebabkan kematian, tetapi memandu secara berbahaya dan melulu. Dalam menguruskan kes sebegini, keseluruhan situasi yang mengarah kepada kemalangan mestilah dilihat secara objektif untuk menentukan sama ada ianya boleh dianggap sebagai memandu secara melulu atau berbahaya. Majistret yang bijaksana dengan jelas telah gagal untuk mengarahkan mindanya kepada undang-undang di dalam kes ini dan telah dipengaruhi oleh fakta bahawa terdapatnya satu kematian. Ini adalah tanpa arah yang merupakan salah arah (lihat perenggan 23, 24 & 26).

(4) Dalam kes ini, pihak pendakwaan telah gagal untuk membuktikan kes prima facie terhadap perayu dan perayu seharusnya dibebaskan dan dilepaskan di akhir kes pendakwaan. Kegagalan majistret yang bijaksana yang memutuskan adalah salah arah undang-undang yang serius yang menyebabkan kegagalan keadilan (lihat perenggan 13).]

Notes

For a case on fatal accident, see 7(1) *Mallal's Digest* (4th Ed, 2006 Reissue) para 458.

For cases on charge for driving recklessly or in manner dangerous to public, see 11 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 580–581.
For cases on miscarriage of justice, see 5(2) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 4644–4707.

Cases referred to

Choong Sze Foong v PP [1975] 1 MLJ 204 (refd)
Ganapathy Rengasamy v PP [1998] 2 MLJ 577; [1998] 2 CLJ 1, FC (refd)
Goh Ah Yew v PP [1940] MLJ 150 (refd)
Lee Ah Seng & Anor v PP [2007] 6 MLJ 1; [2007] 4 AMR 709, FC (refd)
Looi Kow Chai & Anor v PP [2003] 2 MLJ 65; [2003] 2 AMR 89, CA (refd)
Mat v PP [1963] MLJ 263, HC (refd)
Mohamad Radhi bin Yaacob v PP [1991] 3 MLJ 169, SC (refd)
Neville v PP [1992] 1 SLR 153, CA (refd)
PP v Saimin & Anor [1971] 2 MLJ 16, HC (refd)
R v Gosney [1971] 3 All ER 220, CA (refd)
Sivalingam a/l Periasamy v Periasamy & Anor [1995] 3 MLJ 395; [1996] 4 CLJ 545, CA (refd)
Tai Chai Keh v PP [1948–1949] MLJ Supp 105, CA (refd)
TN Nathan v PP [1978] 1 MLJ 134, HC (refd)
Yap Choon Yit v Pendakwa Raya [2008] 6 AMR 813 (refd)
Yusoff bin Kassim v PP [1992] 2 MLJ 183, SC (refd)

Legislation referred to

Criminal Procedure Code s 173(f), (g)
Road Transport Act 1987 s 41(1)

Hisyam Teh Poh Teik (Teh Poh Teik & Co) for the appellant.
Husmin Hussin (Deputy Public Prosecutor, State Legal Advisor's Office) for the respondent.

Mohd Zawawi JC:

THE APPEAL

[1] This is an appeal by the appellant against the decision of the magistrate's court at Johor Bahru on 16 March 2007, wherein the appellant was convicted of a charge under s 41(1) of the Road Transport Act 1987 ('RTA 1987') and sentenced to one month imprisonment and a fine of RM5,000, in default six months imprisonment.

THE CHARGE

[2] The amended charge preferred against the appellant reads as follows:

Bahawa kamu pada 4 Januari 2000 jam lebih kurang 9.30 malam di persimpangan Jalan Kolam Air dan Jalan Kemuncak 2, dalam Daerah Johor Bahru, dalam Negeri Johor Darul Ta'zim sebagai pemandu motokar no. pendaftaran JDG 5005 telah memandu kenderaan tersebut dengan cara melulu dan membahayakan pengguna jalan yang lain sehingga menyebabkan kematian kepada HUSAMUDIN BIN BADRUDIN, NO. K/P: 821111-01-5343 dengan itu kamu telah melakukan kesalahan di bawah Seksyen 41(1) Akta Pengangkutan Jalan 1987 dan boleh dihukum di bawah seksyen yang sama.

THE FACTS OF THE CASE

[3] The facts relevant to this appeal are as follows: On 4 January 2000, at about 9.30pm, a collision occurred between a motorcar bearing registration No JDG 5005 driven by the appellant and a motorcycle bearing registration No JEH 838 ridden by one Husamudin bin Badrudin, deceased, at the junction at Jalan Kolam Air — Jalan Kemuncak 2 in Johor Bahru, resulting in the death of the motorcyclist.

[4] The prosecution's case is that the appellant drove his car from Jalan Kemuncak 2 into Jalan Kolam Air without stopping at the junction and that this amounted to reckless or dangerous driving.

[5] The defence case is that at the material time the appellant was driving his motorcar from his house in Taman Nong Chik to go to his mother-in-law's house in Taman Kolam Air. When he approached the junction between Jalan Kemuncak 2 and Jalan Kolam Air, he gave the signal to turn right and stopped at the junction. On seeing no vehicles on his right, save for a taxi which was some distance away, he turned right towards Taman Kolam Air. Just then he saw two or tree motorcycles from the opposite direction behind the said taxi and one of them suddenly overtook the said taxi and encroached into his path and collided with his motorcar. The point of impact was at the place marked 'F' and 'G' on the police sketch plan, tendered as exh P4.

THE DECISION OF THE LEARNED MAGISTRATE

[6] The learned magistrate has furnished a brief judgment and can be reproduced in full as follows:

Setelah mendengar segala keterangan saksi-saksi dan keterangan kedua-dua pihak, mahkamah mendapati OKT sabit dan salah atas pertuduhan dan dijatuhkan

hukuman 1 bulan penjara dan denga RM5000 tak bayar 6 bulan penjara mahkamah telah mensabitkan OKT atas alasan-alasan berikut:

1. Keterangan SP5 — Mengaku bahawa beliau nampak kenderaan OKT turun bukit dari Jalan Kemuncak menuju ke Jalan Kolam Air tanpa berhenti di simpang. SP5 juga menyatakan bahawa pada masa kejadian lalu lintas tidak sibuk, lampu terang, cuaca baik dan pemandangan beliau tidak terhalang.
2. Keterangan SP6 — Adalah menyokong keterangan SP5 di mana beliau mengesahkan kedudukan kenderaan OKT dan mengesahkan rajah kasar (eks P9) yang disediakan oleh SP5.

Di dalam pembelaan OKT telah memberikan keterangan bahawa si mati telah makan jalan. Namun OKT tidak dapat mengemukakan sebarang saksi bagi menyokong dakwaan beliau.

Oleh itu, mahkamah tiada pilihan kamu selain mensabitkan OKT atas pertuduhan di bawah s 41(1) APJ.

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[7] Although the petition of appeal contained 20 grounds, the primary issues raised by the appellant may be summarised into the following main grounds:

(a) that the learned magistrate failed to scrutinise and evaluate the whole of the evidence before him and that his grounds of judgment is not a reasoned one, it is a non-speaking judgment;

(b) had the learned magistrate applied his mind properly to the quality of the prosecution evidence, he ought to have concluded that the prosecution had failed to prove a prima facie case; and

(c) the learned magistrate erred in law when he did not judicially appreciate the defence case.

Ground one: Non-speaking judgment

[8] The complaint here is that whilst the learned magistrate has stated in no uncertain terms that his decision is based entirely upon the evidence of SP5 and SP6, he did not furnish any reason(s) as to why he preferred their version of the accident as opposed to the appellant's version of the accident. I am of the considered opinion that the appellant's complaint is not unjustified as the reasoning process is very critical for any judicial decision and without it the

decision cannot stand. There is no scrutiny and no maximum evaluation of the evidence adduced by the prosecution. This non-direction amounts to a misdirection.

[9] In *Ganapathy Rengasamy v Public Prosecutor* [1998] 2 MLJ 577; [1998] 2 CLJ 1 the Federal Court said at p 585 (MLJ); p 6 (CLJ):

> First and foremost we would like, with respect, to mention here that the grounds of judgment of the learned judge are far from satisfactory in that they do not convey a 'speaking' judgment although the importance of this has been stressed in a number of decided case (see, for example, *Balsingam v Public Prosecutor* [1959] MLJ 193 per Ismail Khan J (as he then was) and *Murugiah v Public Prosecutor* [1941] MLJ 17 per Horne J). They consist substantially of reproduction of prosecution witnesses' testimonies in the form of questions and answers. The learned judge failed to analyse or assess these testimonies. He merely set them out and presumably accepted them without question. He has not set out the defence of the appellant with a view to assessing it, nor has he tested the defence by comparing it with the evidence adduced by the prosecution.

[10] It is well settled law that the grounds of decision must convey a reasoned judgment of the facts and law and not merely the conclusion arrived at. The absence of reasons indicate the possibility that vital considerations such as the weight of evidence and the probabilities of the case may not have influenced the mental process of the learned magistrate in arriving at the ultimate finding.

Ground two: The quality of the prosecution evidence does not warrant the appellant to be called to enter upon his defence

[11] The second ground addressed by learned counsel for the appellant is that the learned magistrate never directed his mind as to whether a prima facie case has been proved. My attention was directed to the test of what amounts to a prima facie case in *Looi Kow Chai & Anor v Public Prosecutor* [2003] 2 MLJ 65; [2003] 2 AMR 89 where Gopal Sri Ram held at p 80 (MLJ); p 104 (AMR):

> It therefore follows that there is only one exercise that a judge sitting alone under s 180 of the Code has to undertake at the close of the prosecution case. He must subject the prosecution evidence to maximum evaluation and to ask himself the question: If I decide to call upon the accused to enter his defence and he elects to remain silent, am I prepared to convict him on the totality of the evidence contained in the prosecution case? If the answer is in the negative then no prima facie case has been made out and the accused would be entitled to an acquittal.

[12] Applying the above test to the prosecution case and having carefully scrutinised the grounds of judgment, I am in full agreement with learned counsel that there is no attempt made by the learned magistrate to analyse or maximally evaluate the evidence of the prosecution witnesses. Although it is not expressly stated in s 173(f) and (g) of the Criminal Procedure Code that reasons need to be accorded by court when considering whether or not a prima facie case has been made out, it is however clear from the said provision that the court is bound to give consideration to evidence adduced and to then arrive at decision as to whether the accused may be acquitted or called upon to enter his defence on the charge against him. Such a decision should be reached only after a thorough and comprehensive evaluation of the evidence has been undertaken (see *Yap Choon Yit v Pendakwa Raya* [2008] 6 AMR 813), Held of No 1 (a)) I am of the considered opinion that in this instant case, no prima facie case has been made out. The reason being as follows:

SP5 is not a credible witness

12.1 The prosecution called three so-called 'eye-witnesses' to testify at the trial. Their star witness is Mohd Lufti bin Ahmad Mahir (SP5). His evidence in a nutshell is this. At the time of the accident he was driving his motorcar along Jalan Kolam Air from the direction of C to D in the police sketch plan (at p 88 of the appeal record). There was a motorcycle in front of him traveling in the same direction. At a distance of about 30 to 40 feet from the junction he saw a motorcar coming down from Jalan Kemuncak 2 and turning right into Jalan Kolam Air without stopping at the junction. He then heard a sound like accident and saw a person thrown on the road. The crowd that gathered put the victim in the said motorcar to be taken to hospital. He spoke to the driver of the motorcar and he smelled of beer. He lodged a police report eight days later and after that also drew a sketch plan of the scene of the accident which was tendered as exh 'P9' (at p 114 of the appeal record).

12.2 With respect, the learned magistrate erred in law and in fact in accepting SP5's evidence in toto when the evidence clearly shows that he is not a credible witness. He has obviously failed to assess his credibility, which has been severely damaged by the following matters:

(a) Admissions by SP5

SP5 made the following admissions in cross-examination:

(a) that he lodged a police report on 12 January 2000, some 8 days after the accident, although there was ample opportunity for him to lodge the report earlier (at p 34 of the appeal record);

(b) that he had given two versions of the accident, namely,

(i) in his police report marked as exh D10 (at p 102 of the appeal record) where he stated that the motorcycle in question came from the opposite side of the road, and

(ii) in his evidence in court where he said that the motorcycle was traveling in front of him (ie in the same direction) at the time of the accident (see pp 34–35 of the appeal record); and

(b) that he did not say in his police report (at p 102 of the appeal record) that the motorcar that came down Jalan Kemuncak 2 did not stop at the junction before entering Jalan Kolam Air, although it is a very material fact and forms the crux of the prosecution case against the appellant. The failure to state material facts in one's police report will raise a serious issue of credibility as had been held by the Federal Court in *Lee Ah Seng & Anor v Public Prosecutor* [2007] 6 MLJ 1 at p 21; [2007] 4 AMR 709 at pp 725–726:

> In this case the deliberate failure of Hassan Lee to mention in the FIR the second half of the incident, including the appellants' involvement in it, should have given cause to the learned trial judge to be very careful about accepting Hassan Lee's evidence of the appellants' complicity in the crime. Of course if there was a reasonable explanation for the failure, it should not have any effect on the veracity of Hassan Lee.

(c) Material contradictions in SP5's evidence

The evidence of SP5 was full of material contradictions which were never considered by the learned magistrate. The major contradictions are:

(a) SP5's version of the accident as depicted in his own sketch plan marked as exh 'P9' (at p 114 of the appeal record) contradicts the independent sketch plan drawn by the police investigating officer, Sgt Mohd Tajul Arifin bin Tajuddin (SP3) which was tendered as exh 'P4 & P4K' (at pp 88–89 of the appeal record);

(b) When SP5 was questioned on the discrepancy between his police report and his oral evidence in court concerning the path of travel of the (deceased's) motorcycle at the time of the accident, at first he said that the version given by him in court was the correct version, ie that the motorcycle was traveling in front of him and not opposite to him (see p 51 of the appeal record) but later he changed his version and said that the motorcycle came from the opposite direction (see p 52 of the appeal record).

12.3 I am of the opinion that the failure of the learned magistrate to observe these contradictions and discrepancies is a good ground

for appellate intervention as held by Edgar Joseph Jr SCJ in *Yusoff bin Kassim v Public Prosecutor* [1992] 2 MLJ 183 (at p 188):

> We recognised that the learned trial judge had a great advantage, denied to this court, of seeing and hearing the witnesses and the appellant testify. Be that as it may, there is a wealth of authority for the proposition that upon an issue depending upon oral evidence where there is plainly perjury on the one side or other, a Court of Appeal ought to be greatly influenced by the opinion of the trial judge, who has seen and heard the witnesses, except where he has failed to observe inconsistencies or to take into account of material circumstances or probabilities (see example, *Khoo Sit Hoh Ors v Lim Thean Tong*). An appellate court can, therefore, in appropriate cases, act upon its own view of the conflicting evidence (see *Coghan v Cumberland* and *Bigsby v Dickson*).

(d) Falsity of SP5's allegation

12.4 SP5 also made a very serious allegation that the appellant smelled of beer after the accident, thus suggesting that the appellant was driving under a state of intoxication, which does not inspire confidence for the following reasons:

(i) the evidence of the other prosecution witnesses, in particular,

(a) SP7, who followed the appellant in his car when he took the injured motorcyclist to hospital did not say that the appellant smelled of beer or alcohol;

(b) SP6, who saw the appellant after the accident, said that he was in a normal condition; and

(c) SP8 (Chief Inspector Vikra Masthinthen @ Victor a/l Ganesan), the police investigating officer who recorded the appellant's statement in the police station soon after the accident said that he did not conduct a breath test on the appellant because he did not smell of alcohol.

(ii) the appellant's evidence that he does not consume alcoholic drinks, which was neither challenged nor contradicted by the prosecution.

(e) Late emergence of the witness

12.5 SP5 only surfaced some eight days after the accident when he lodged his police report after discussing the accident with on Syed Anuar Syed Husin (who was not called as a witness by the prosecution). He also did not give any explanation for the undue delay in lodging his police report. The value of his police report as

well as his bona fides are therefore questionable, given the possibility of fabrication afforded by the delay.

Wrong in holding that SP6 corroborated SP5

12.6 With respect, the learned magistrate erred in holding that SP6 had corroborated SP5. Firstly, SP6 does not know how the accident happened as he only came on the scene after he heard the sound of a collision. Secondly, since SP5 is a not a credible or reliable witness, he cannot in law be corroborated by another witness. Corrobortion is required or afforded only if the witness requiring corroboration or giving it is otherwise credible (see *TN Nathan v Public Prosecutor* [1978] 1 MLJ 134).

Failure to recognise that the prosecution had presented two conflicting versions of the accident

12.7 On the evidence adduced by the prosecution, the prosecution has presented two conflicting versions of the accident.

The first version

The initial investigating officer, Sgt Mohd Tajul Arifin bin Tajuddin (SP3), who arrived at the scene shortly after the accident made out a sketch plan and key of the scene of the accident, which was marked as exh 'P4 and P4K' (at pp 88–89 of the appeal record). The said sketch plan shows the presence of blood stains and glass splinters at points marked as 'F' and 'G' respectively. According to SP3, 'G' is the point of impact. His evidence on this appears at p 33 of the appeal record:

S: Tanda G pecahan kaca, boleh kereta itu tempat kemalangan terjadi.

J: Ya.

Two other prosecution witnesses, namely SP5 and SP7 agreed with him on this. See the evidence of SP5 at p 52 of the appeal record:

S: Bermakna F dan G tunjuk tempat kemalangan

J: Ya.

The evidence of SP7 is at p 63 of the appeal record:

Perlanggaran motor dan kereta di tempat bertanda SP7A.

(Note: SP7A is the point of collision marked by SP7 on the police sketch plan as shown in p 64 of the appeal record.)

Most importantly, SP7 even admitted that the deceased had encroached onto the appellant's side of the road when the collision occurred. At p 64 of the appeal record he said as follows:

A Kalau ikut tempat kemalangan mangsa telah makan jalan.

The above version shows that the accident occurred on the appellant's lane where the glass fragments (marked as 'G' on P4) and blood stain (marked as 'F' on P4) were found and that the deceased had encroached into the
B appellant's side of the road that there was a head-on collision.

The second version

The second version of the accident was given by SP5 and the sketch plan drawn by him, exh 'P9' (at p 114 of the appeal record).

C 12.8 It would appears that the learned magistrate simply accepted the second version without any judicial evaluation and without giving any reasons why he did not believe SP3, the investigating officer who first arrived on the scene.

D 12.9 I am of the opinion that this is serious error warranting appellate interference. The two sketch plans exh P4 and exh P9 both produced by the prosecution strike at each other and completely demolish its own case. It is of course, trite law that any inconsistencies in a criminal case should be resolved in favour of the accused. In *Yusoff Kassim v Public Prosecutor* [1992] 2 MLJ 183 at p 187, Edgar Joseph Jr JFC held as
E follows:

> There was thus an acute conflict of evidence upon a question of central importance in the case for the prosecution itself, giving rise to more than a reasonable doubt as to whether the appellant carried one or two bags, the
F benefit of which he was plainly entitled to.

12.10 Further, where more than one inference can be drawn from a set of facts, the inference most favourble to the accused must be adopted (See *Tai Chai Keh v Public Prosecutor* [1948–1949] MLJ
G Supp 105).

12.11 Applying those principles, the learned magistrate ought to have accepted the first version of the accident as it is more favourable to the defence. In any event, it is also the more probable version as it is supported by:

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(a) the testimony of SP3, the police officer who drew exh P4 said that the collision occurred at the place marked as 'F' and 'G' by him;

I (b) the testimony of SP5 himself to the effect that it was a head-on collision;

(c) the testimony of SP7 who confirmed the point of impact at SP7A (at p 64 of the appeal record) and agreed that the deceased had encroached into the appellant's way; and

(d) the damage to the appellant's vehicle as seen in the police photographs marked as exh P2 and the Puspakom Report marked as exh P15 (pp 100 and 110 of the appeal record) which is consistent with a head-on collision.

[13] The prosecution had failed to make out a prima facie case against the appellant and the latter ought to have been acquitted and discharged at the close of the prosecution case. The failure of the learned magistrate to so hold is a serious misdirection in law resulting in a miscarriage of justice. In the case of *Public Prosecutor v Lee Eng Kooi* [1993] 2 MLJ 322 at p 323 (Held of No (3)), Vincent Ng JC (as he then was) observed as follows:

> As regards the second charge, the contents of exh P27 and the oral evidence of PW3 and PW9 could not both be true and the court found that both the witness had lied on facts which were verifiable. In such a case where the prosecution leads two sets of evidence, each one of which contradicts and strikes at the other and shows it to be unreliable, the court will be left with no reliable and trustworthy evidence upon which a conviction of the accused might be based. There were also other infirmities and unsatisfactory features in the prosecution case which made it unsafe to call the accused to enter upon his defence.

Ground three: Failing to judicially appreciate the defence case

[14] The third ground addressed by learned counsel for the appellant is that a serious defence has been completely brushed aside by the learned magistrate in his non-speaking judgment.

[15] Now, the appellant testified on oath as follows:

(a) On the night in question he was driving his car alone along Jalan Kemuncak 2 with the intention of going to Taman Kolam Air;

(b) Upon reaching the junction with Jalan Kolam Air, he stopped at the halt line marked as E in the police sketch plan and gave the signal to turn right;

(c) On seeing no vehicle approaching from either side, save for a taxi which was about 100 feet away to his right, he proceeded to turn right;

(d) Just then he saw 2 to 3 motorcycles from the opposite direction behind the said taxi;

(e) Suddenly one of them overtook the said taxi, encroached onto his side and collided with his motorcar at the points marked as 'F' and 'G' in the police sketch plan;

(f) He stopped his car at the scene and on seeing the condition of the rider of the motorcycle (identified later as the deceased) rushed him to Hospital Sultanah Aminah Johor Bahru in his motorcar;

(g) After that he went to the Traffic Police Station and lodged a report;

(h) Shortly afterwards his statement was recorded by the investigating officer (SP8), which was tendered as exh D16 (see pp 103–106 of the appeal record);

(i) He denied that the collision took place at the point marked by SP5 in his sketch plan, marked as exh P9; and

(j) He was a teetotaler and denied consuming alcohol before the accident (see pp 76–81 of the appeal record).

[16] In a nutshell, the defence is that the appellant had completed turning right and was already on his own side of the road when the deceased's motorcycle encroached onto his side and collided with his motorcar.

[17] I find no cause to disagree with learned counsel. The appellant's version in respect of the point of impact is corroborated by the police sketch plan (exhs P4 and P4K) and the evidence of SP3, SP5 and SP7. The damages to the appellant's motorcar show that it was a head-on collision. The appellant's version of the accident is also consistent with his police statement given soon after the accident (exh D10), thus dispelling any notion that it is an afterthought.

[18] SP5's allegation that the appellant did not stop at the junction before turning right is questionable, given his failure to state this material fact in his police report. SP5's allegation that the appellant had smelled of beer after the accident was also demolished by the police investigating officer (SP8) and the two civilian witnesses (SP6 and SP7).

[19] The failure of the learned magistrate to consider these matters has greatly prejudiced the defence and is a strong ground for appellate interference. The duty of the trial court to consider the defence of the accused has been succinctly stated by Chan Sek Keong J (as he then was) in the Singapore case of *Neville v Public Prosecutor* [1992] 1 SLR 153 at p 161:

> It is the duty of the trial judge or judges to consider the defence of the accused and the evidence that is adduced in support of that defence. That is fundamental. A failure to carry out that duty will inevitable lead to a miscarriage of justice. Where the evidence adduced at a trial, whether it be adduced by the prosecution or the defence will exonerate the accused of the offence with which he is charged, or reduced it to some lesser offence, it is also the duty of the trial judge or judges to consider such evidence to determine whether it is sufficient to acquit the accused

himself, whether or not he is represented by counsel, has not raised the particular defence which has that effect. The role of the court is to find whether or not the accused is guilty as charged on the evidence placed before it. But there must be some evidence on which the court can act.

No adverse inference as to how defence is conducted

[20] The learned magistrate rejected the appellant's version of the accident for the reason that he did not call any witness to support his version of the accident. This is what he said (at p 15 of the appeal record):

Di dalam pembelaan OKT telah memberikan keterangan bahawa si mati telah makan jalan. Namun OKT tidak dapat mengemukakan sebarang saksi bagi menyokong dakwaan beliau.

[21] With respect, this reflects a wholly erroneous view of the law. It is an elementary principle of law that in a criminal case there is no duty on the defence to call witnesses for the purpose of corroboration. This principle was most eloquently expressed by Spencer Wilkinson J in *Goh Ah Yew v Public Prosecutor* [1940] MLJ 150 as follows at p 153:

There is no duty upon an accused to call any evidence. He is at liberty to offer evidence or not as he thinks proper and no inference unfavourable to him can be drawn because he adopts one course rather than the other. *Emperor v Dhunno Kazi* and see *Woodroffe* on Evidence 9th Ed at p 813; *Sarkar on Evidence* 5th Ed 865.

[22] Even on the facts, the learned magistrate is clearly mistaken as the appellant's version of the accident is amply corroborated by prosecution witnesses such as SP5, SP6 and SP7 and the police sketch plan and key (exhs P4 and P4K).

THE LAW ON S 41(1) OF THE RTA 1987

[23] The essence of the charge against the appellant is dangerous or reckless driving. It has repeatedly been held that driving is not necessarily reckless or dangerous because it leads to fatal consequences but guilt could only ensue if it is proven that the driving was reckless or dangerous. The charge is not one of causing death, but of driving dangerously or recklessly. See for example, *Tan Thang Sang v Public Prosecutor* and *Choong Sze Foong v Public Prosecutor* [1975] 1 MLJ 204.

[24] In dealing with such a case, the whole situation leading to the accident must be viewed objectively to determine whether it can be considered reckless or dangerous driving. In *R v Gosney* [1971] 3 All ER 220 Megaw LJ remarked as follows:

> In order to justify a conviction there must not only have been a situation which, viewed objectively, was dangerous, but also some fault on the part of the driver, causing that situation (see p 224c, post); …

[25] In the Malaysian case of *Public Prosecutor v Zulkifli b Omar* [1998] 6 MLJ 65, at pp 71–72, Vincent Ng J (as he then was) said as follows:

> The dictum of Lawton LJ in the English Court of Appeal decision in the celebrated case of *R v Guilfoyle* [1973] 2 All ER 844 — which concerned a lorry driver who was convicted of causing death by dangerous driving is illuminting. He had this to say (at p 845):
>
> > Cases of this kind (causing death by dangerous of reckless driving) fall into two broad categories; first, those in which the accident has arisen through momentary inattention or misjudgment (hereafter called 'the first category'), and secondly those in which the accused has driven in a manner which has shown a selfish disregard for the safety or other road users or of this passengers, with a degree of recklessness (hereafter called 'second category').
>
> This distinctive categorisation of dangerous driving was discussed with ready approval by Ong CJ (Malaya) in the cases of *Tan Thang Sang v Public Prosecutor*; *Choong Sze Foong v Public Prosecutor* [1975] 1 MLJ 204. See also *R v Boswell and other appeals* [1984] 3 All ER 353 (CA). And more recently, in 1993 this categorisation was also adopted in my decision on *Goh Kheng Seong v Public Prosecutor* [1993] 1 MLJ 103. It is precisely in recognition of this distinction between the two categories of offences under s 41(1) for causing death by reckless or dangerous driving, that the Legislature has, in all its wisdom, made express provision under s 41(4) that:
>
> > The court may upon the trial of a person for an offence under this section (s 41(1)) convict such person of an offence under s 42 (dangerous and reckless driving but without causing death) or section 43 (driving without due care and attention or without reasonable consideration.)
>
> As parliament has not spelt of the meaning of 'driving dangerously' or 'driving recklessly' it is left to the courts to do so. To be guilty of the more serious category of the offence of reckless driving the driver (defendant) must have created an obvious and serious risk of injury to the person or damage to property and must either have given no thought to the possibility of that obvious risk, or have seen the risk and nevertheless decided to run it.
>
> It is not in every case where the defendant is in fact driving dangerously that he should be held to be driving recklessly, although in most cases the two will coincide. The definition of the word 'driving recklessly' in Lord Diplock speech in *R v*

Lawrence [1981] 1 All ER 974 at p 982; [1982] AC 510 pp 526–527 and extensively discussed with approval by the five Law Lords in the recent English House of Lords decision in *R v Reid* [1992] 3 All ER 673, albeit, redefined and recrafted in less controversial but more focused language, by Lord Goof of Chieveley — a member of the board — which I think it useful that I should set out there (at p 693):

> On this approach, enlivened by examples, it is, I believe, relatively easy to understand Lord Diplock's encapsulation of the law in this specimen direction, which is to the effect that a jury should only convict a defendant of driving recklessly if they are sure of the following: (i) that he was in fact driving in such a manner as to create a serious risk of causing phusical injury to some other person who might happen to be using the road, or doing substantial damage to property; and (ii) either (a) that he recognised that there was some risk of that kind involved, but nevertheless went on to take it; or (b) that, despite he was driving in such a manner, he did not even address his mind to the possibility of there being any such risk, and the risk was in fact obvious. See also *R v Boswell and other appeals*.

In an offence under s 41(1), excessive speed is not the sole decider of reckless driving but there must also be a finding on the manner and other aspects of the defendant's driving which constituted recklessness, by having regard to the prevailing circumstances at the material time of accident, including the nature, condition, and size of the road, and the amount of traffic which is or might be expected on the road. The risk created by the manner in which the vehicle is driven must be both obvious and serious, and the court has to be satisfied that the essential or core ingredients of recklessness have been proved beyond reasonable doubt'. (see also *Ramiah v Public Prosecutor* [1972] 2 MLJ 258).

[26] The learned magistrate has obviously failed to direct his mind to the law in this case and had been unduly influenced by the fact that there had been a death. This is a non-direction which amounts to a misdirection.

THE DUTY AND FUNCTION OF THE APPELLATE COURT

[27] Though generally an appellate court would be slow to disturb findings by a trial court, especially on facts, there are several instances where it would be justified in interfering. In *Dato' Seri Anwar Ibrahim v Public Prosecutor and another appeal* [2004] 3 MLJ 405; [2004] 3 CLJ 737, at p 418 (MLJ); at p 752 (CLJ) Abdul Hamid Mohamed FCJ (as he then was) held as follows:

> Clearly an appellate court does not and should not put a brake and not going any further the moment it sees that the trial judge says that is his finding of facts. It should go further and examine the evidence and the circumstances under which that finding is made to see whether, to borrow the words of HT Ong (CJ Malaya) in *Herchun Singh*'s case (supra) 'there are substantial and compelling reasons for disagreeing with the finding'. Otherwise, no judgment would ever be reversed on

A question of fact and the provision of s 87 of the CJA 1964 that an appeal may lie not only on a question of law but also on a question of fact or on a question of mixed fact and law would be meaningless.

B **[28]** It is the duty of the appellate court to intervene in a case where the trial court had fundamentally misdirected itself, that one may safely say that no reasonable court which had properly directed itself and asked the correct questions would have arrived at the same conclusion (see *Sivalingam v Periasamy & Anor* [1995] 3 MLJ 395; [1996] 4 CLJ 545).

C ERROR IN ASSESSING THE DEFENCE CASE

[29] The learned magistrate had imposed an extremely high burden of proof on the appellant. He has overlooked or ignored the basic principle in criminal justice that the duty lies on the prosecution from the beginning to the end to prove the charge against the accused beyond reasonable doubt (see *Public Prosecutor v Saimin & Anor* [1971] 2 MLJ 16). If this principle had been followed, he would no doubt have held that the prosecution had failed to establish a prima facie case against the appellant and discharged the appellant at the close of the prosecution case. The decision to call for the defence is therefore clearly wrong in law.

[30] Having called for the defence, the learned magistrate ought to have followed the formulae prescribed by Suffian J (as he then was) in the well-known case of *Mat v Public Prosecutor* [1963] MLJ 263. These principles have been followed by the Supreme Court in *Mohamed Radhi bin Yaakob v Public Prosecutor* [1991] 3 MLJ 169 at p 171 where Mohd Azmi SCJ held as follows:

> To earn an acquittal, the court may not be convinced of the truth of the defence story or version. Raising a reasonable doubt in the guilt of the accused will suffice. It is not, however, wrong for the court to be convinced that the defence version is true, in which case the court must order an acquittal. In appropriate cases it is also not wrong for the court to conclude that the defence story is false or not convincing, but in that instance, the court must not convict until it asks a further question, that even if the court does not accept or believe the defence explanation, does it nevertheless raise a reasonable doubt as to his guilt? It is for this reason that in dealing with the defence story or explanation, the majority of judges rightly prefer to adopt straightaway the legally established 'reasonable doubt' test, rather than to delve in the 'believable and convincing' test before applying the 'reasonable doubt' test.

CONCLUSION

[31] In the upshot, I find that the learned magistrate had erred on numerous counts in assessing and considering the evidence before him. As a result, his findings and decision are contrary to the weight of evidence and are wholly erroneous. This is undoubtedly a fit and proper case for appellate interference.

[32] Accordingly, the appeal was allowed and that the appellant's conviction and sentence be set aside and substituted with an order of acquittal and discharge.

Appeal allowed.

Reported by Ashgar Ali Ali Mohamed